In the Supreme Court of the United States

October Term, 1971

No. 71-108

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MICHAEL RODAK, JR.,

JAMES OSTROWSKI,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

The State Court has not decided a federal question of substance not theretofore determined by this Court, nor has the State Court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved herein.

QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Is handwriting exemplar, used solely for identification purposes, a mere identifying physical characteristic and, as such, outside the scope of the Fifth Amendment privilege against self-incrimination, even if the words written are identical to the words contained in a writing directly linked to the crime; and are *Miranda* warnings required be given prior to the giving of such handwriting exemplar?

2. Where police officers investigating arson desire to question a juvenile alone in his home and his parents voluntarily absent themselves from the particular room, and in the course of the questioning the juvenile voluntarily gives them a handwriting exemplar, and there is no evidence that the juvenile was under arrest, should the exemplar be excluded from evidence as "tainted fruit"?

3. Whether at a hearing before the juvenile court, where the juvenile is represented by two attorneys, any constitutional privilege of the juvenile is violated by the exclusion of his parents from the courtroom, under an order for separation of witnesses, until such time as they have given their testimony as witnesses supporting a claimed alibi?

HISTORY OF THE CASE

James Ostrowski, fifteen years of age, was charged in the Juvenile Court of Cuyahoga County, Ohio, with being a delinquent child in that he willfully and maliciously set fire to and burned three separate inhabited dwellings in Independence, Ohio. At a preliminary hearing the Juvenile Court decided to retain jurisdiction.

At the hearing on the merits one of the charges was dismissed. As to the other two charges, the juvenile was found delinquent and was committed to the legal custody of the Youth Commission of the State of Ohio. The Court of Appeals, Eighth District, reversed and remanded, in a Memorandum to Lawyers dated April 17, 1971. The Supreme Court of Ohio reversed, *State v. Ostrowski*, 30 Ohio St. 2d 24 (April 26, 1972).

STATEMENT OF THE CASE

One of these two charges involved setting fire to the dwelling of Mr. and Mrs. Ventura at 7557 Midland Road, Independence, Ohio, on May 10, 1970. The other delinquency finding involved setting on fire the home of Mr. and Mrs. Podojil at 68 Brookside Road, Independence, Ohio, on December 25, 1969. Both were set fires of incendiary origin. Each fire had the earmarks of an aberrant psychosexual. While the physical and psycho-sexual characteristics of both fires were similar, the evidence of criminal agency in each fire was entirely different and the facts in each required separate and distinct applications of law.

The Podojil Fire.

Mrs. Podojil testified that on Christmas Day, 1969, her family was at home all day except for about an hour

in the evening when they were away. They left the home about 8:00 p.m. When they returned at 9:00 p.m., their home was in flames (R. 36, B.E. 215).

Mrs. Podojil kept an extra key on the outside for the use of her daughter (R. 36, B.E. 213). (There was also testimony that James Ostrowski stated to a police officer that he was good friends with the Podojils and while they were building the home he knew where they had the keys placed to get into the house, and he also stated that he knew that they had a key hidden outside the rocks in front of the house at the time of the fire.)

The Ostrowskis lived next door to the Podojil home.

In describing an earlier break-in, Mrs. Podojil testified that nothing was disturbed in the home except her clothing, which had been thrown about the bedroom. She said, "My underclothing had been taken out of the bedroom drawer." Her husband's clothing was taken out of the drawers but, unlike her garments, it was not strewn about. Instead it was "laid on the bed in a pile of folded up clothing" (R. 39, B.E. 227). Her daughter's clothing also was disturbed, thrown about the bedroom. Some of the underthings were out in the bedroom hallway. She also testified that the youth herein, James Ostrowski, had been at her residence during the day of the fire (R. 38-39, B.E. 219) and had knowledge of where the Podojil family would be that evening (R. 40, B.E. 233).

The criminal agency as to the fire at the Podojil's was established through the testimony of Thomas Bokmuller, who testified that the defendant, James Ostrowski, had told him that, "Well, James told me that he had lit the Podojil house afire and also the car" (R. 30, B.E. 49). He said, "Well, he stated that he lit the sleeve of a coat in the closet and the bedspread." Bokmuller was fifteen years of age, in the tenth grade at Independence High

School, and a friend of James Ostrowski, having known James three years (R. 28, B.E. 10).

The Ventura Fire.

On May 10, 1970, the Ventura home on Midland Road in Independence was set on fire while the members of the family were away. Mrs. Ventura's mother testified that her clothing was pulled out of her dresser and thrown on the floor, and that on top of her dresser was a bra, the tips of which were painted red with nail polish (R. 43, B.E. 258). She also observed that the leg part of her underclothing was painted. Two hundred dollars in bills in her dresser drawer was not touched. Upon the mirror of her dresser four-letter obscenities had been scribbled with nail polish (R. 42-43, B.E. 257). The alarm was received by the Independence Fire Department at approximately 6:45 p.m. on the evening of the 10th.

Fire Captain James Waters, an arson expert, examined the premises after the fire. His examination disclosed ten separate and unconnected "points of origin". The separate points of origin indicated that the fires "were set" (R. 47, B.E. 299). Captain Waters also found that the bedroom dresser drawers had been pulled out and emptied on the floor at the base of the bed (R. 45, B.E. 298). It was his opinion that it was a set fire (R. 48, B.E. 305). The fire was set by piling clothes on the floor and lighting them and edges of bedspreads being ignited in several rooms of the house.

Sergeant Maiotti, who at this time was investigating a series of fires in Independence, visited the Ostrowski home on the evening of May 11, 1970 to ask a few questions of James and obtain a handwriting exemplar, as had already been done with several other youths in the area.

Maiotti was accompanied by Sergeant Lambecker of the Independence Police Department.

The handwriting exemplar James Ostrowski gave the officers was subsequently submitted to Joseph Tholl, a document examiner well known in the Cleveland area, along with other handwriting exemplars and pictures of the mirror with the obscenities written thereon obtained from the Ventura residence. Mr. Tholl's findings were that the writing on the Ostrowski exemplar and that on the mirror were made by the same hand, that of James Ostrowski. As a matter of fact, Mr. Tholl subsequently testified that according to his findings there was only a one in a billion chance that the writing on the mirror was not that of James Ostrowski.

Defense Testimony.

Casimir Ostrowski, the father of the juvenile, testified that Sergeant Maiotti of Independence Police Department came to their home and asked them if he might ask James some questions (R. 54, 55, B.E. 435, 437). He said, "Well, my wife and I left the room and Sergeant Maiotti and Sergeant Lambecker took my son into the kitchen."

Under cross-examination Mr. Ostrowski testified he did not specifically object to Sergeant Maiotti interrogating his son outside his presence (R. 59, B.E. 451). He said, "I had no objection to Mr. Maiotti questioning my son" (R. 59, B.E. 452).

Both parents testified that James was at home at the time of both fires.

Motion to Suppress.

The defense submitted a pre-trial motion to suppress any statements made by the juvenile to the police officers

and to suppress the handwriting specimens. The motion was based upon alleged violations of the *Miranda* warnings. The court granted the motion to suppress the statements and overruled it as to the handwriting specimen.

Pertaining to the handwriting specimen, Sergeant Maiotti of the Independence Police Department testified that he visited the Ostrowski home and asked the defendant's parents to allow him "to obtain a handwriting specimen—that he would like to question the defendant alone" (R. 9, B.E. 26-27). His parents agreed and went upstairs. Maiotti and Lambecker then proceeded to question the youth as they sat in the kitchen (R. 11-30, B.E. 18-51). During the course of the questioning Ostrowski consented to giving Sergeant Maiotti a handwriting exemplar which was done (R. 25, B.E. 99-100). The questioning lasted from 10:00 p.m. until approximately midnight, when the parents were called downstairs and Maiotti and Lambecker left (R. 10, B.E. 29-30, R. 19, B.E. 56). The court observed that the questioning was in the defendant's own home with his parents' permission.

Casimir Ostrowski, the juvenile's father, testified that Sergeant Maiotti came to his home and said that he wanted to question James (R. 13, B.E. 36) and that they took him into the kitchen (R. 15, B.E. 39). After talking to James alone, the sergeant showed him a specimen of the defendant's handwriting (R. 16, B.E. 40). Mr. Ostrowski testified that while the sergeant was questioning James in the kitchen the parents went up to their bedroom upstairs. The parents did not object to the questioning of their son by the officer (R. 16, B.E. 46). The father testified (R. 17, B.E. 50):

> "Actually Sergeant Maiotti asked me, told me that he wanted to take James' handwriting and I asked him what for. Sergeant Maiotti said, 'Just for a compari-

son. I am taking all of the kids' handwriting examples.' "

Mr. Ostrowski further testified that he made no comment when the officer asked to take a specimen of his son's handwriting. At (R. 18, B.E. 1) the following appears:

"Q. So you knew what the officer wanted as to getting, I mean you knew what he wanted to get, a handwriting sample from your son, is that right?

A. Yes.

Q. Then apparently you indicated that the officer said that he would prefer to talk with your boy alone, is that the gist of it, anyway?

A. Yes, sir.

Q. All right. And what did you say on that, 'Well, no, I would like to be there,' or 'I don't care,' or what, would you give your response to that? Did you deny them the right to talk to your son alone?

A. Again, I did not deny.

Q. I see. Now, when you went, when they went into the kitchen, where did you go, if anyplace?

A. My wife and I went upstairs.

Q. For any particular reason?

A. Because Sergeant Maiotti ordered us to go upstairs. No, sir, I beg your pardon, I will take that back."

(R. 18-19, B.E. 52):

"Q. And he didn't tell you to go upstairs, though, you chose to go upstairs now?

A. Yes."

Lena Ostrowski testified that the officers suggested that they wanted to question her son alone (R. 20, B.E. 75). The following questions and answers then appear:

"Q. Did you ask to be in the room with your son?

A. No, I did not ask.

Q. And your husband, neither did he ask to be in the room?

A. He did not.

Q. And at any point did you try to go in the kitchen to be there with the two officers?

A. No, we did not.

Q. And so that you were never denied, you never tried to get in there and they said, 'No, don't come in,' that never happened, did it?

A. No, that didn't happen."

When questioned about the handwriting specimen, James Ostrowski himself said that when he made the specimen for the officer he had no reason not to fill it out. The following questions and answers appear (R. 25, B.E. 100-101):

"Q. You would have no reason not to fill it out, would you?

A. That is right. That is why I filled it out.

Q. And you weren't even reluctant to fill it out, were you?

A. No, I was not.

Q. You filled it out readily and this is your printing and handwriting in the various places?

A. Yes, it is."

Separation of Witnesses.

At the beginning of the preliminary hearing counsel for the defense moved for a separation of witnesses (R. 5, B.E. 3). This motion was granted by the trial court. After the testimony on the pre-trial motions had concluded at first the defense moved that the "parents be present during the course of the entire proceedings" but later made no

objection and apparently acquiesced when the court observed that the record may show that the defense counsel is requesting a separation of witnesses along with the prosecutor. The following appears at (R. 26-27, B.E. 4-5) in the trial proceedings:

> "The Court: Will everyone except James Ostrowski and Sergeant Maiotti and the first witness who is going to testify, please step outside the courtroom and wait until they are called.
>
> Mr. Perelman: May the parents stay?
>
> The Court: If they are going to be witnesses it is rather unusual.
>
> Mr. Perelman: Permit me to put it on a formal basis. I move that the parents be present during the course of the entire procedure.
>
> Mr. Suster: I have no objection as long as they won't testify.
>
> Mr. Perelman: They will testify.
>
> Mr. Suster: Then I object. If they are going to testify—
>
> The Court: I inquired and counsel told me he did want a separation of witnesses.
>
> * * * * *
>
> Mr. Perelman: For the record, is the Court overruling this?
>
> The Court: That is right. As long as the parents are going to be witnesses—I certainly concede their right to be here, if they weren't going to testify.
>
> I am certain the record can show that Mr. Perelman is requesting a separation of witnesses along with the Prosecutor."

At (R. 64, B.E. 516) the following appears:

> "The Court: They have a perfect right to be here. Ordinarily, the parents would be entitled to be

here with the child, but inasmuch as they were going to be witnesses and there was a separation of witnesses requested, we excused them."

REASONS FOR REFUSING THE WRIT

1, 2. The petition herein contains certain misstatements of fact and irrelevant matters not reflected in either the printed record or the bill of exceptions. For example, the record nowhere shows that the police officers "took possession" of the Ostrowski home or exercised any control over it. On the contrary it does disclose that the parents voluntarily removed themselves to the upstairs while the officers were questioning the son. James Ostrowski willingly talked with the officers and freely and voluntarily gave them the handwriting exemplar.

Petitioner sets forth an excerpt from the testimony involving the discussion of schizophrenia by the officer and the juvenile. (This testimony is not in the printed record.) In any event, it could never provide a basis for concluding that Ostrowski's conversation with the officers was in any way coerced or that there was any compulsion in the giving of the handwriting exemplar.

The opinion of the Supreme Court of Ohio reversing the decision of the Court of Appeals sets forth the following facts with respect to the handwriting exemplar:

> "In the instant case, it is admitted that the exemplar was given voluntarily. An examination of the exemplar clearly indicates that it contains nothing 'testimonial' in character, and from an evidentiary standpoint it was used solely for handwriting identification purposes. While it did contain three of the four words printed on the mirror, it also contained, on what

appears to be a standard form of the detective bureau, James Ostrowski's printing of some fourteen names, three street addresses, and all of the Arabic numerals. The expert testimony, both of the prosecution and the defense, was not limited merely to a comparison of the three words which appeared both on the mirror and on the exemplar."

The opinion summarizes the Fifth Amendment position of the Court of Appeals as follows:

"The Court of Appeals concluded that the handwriting exemplar should have been suppressed, both on the basis of the Fifth Amendment privilege against self-incrimination and on the basis of the Fourth Amendment privilege against 'unreasonable searches and seizures.' In concluding a Fifth Amendment violation, the Court of Appeals attached particular significance to the fact that the handwriting exemplar contained 'the very words written on the mirror' and 'thus should have been suppressed on this ground.' Essentially it appears to have been the view of the Court of Appeals that the exemplar thus had a 'special testimonial value,' and thus was required to be suppressed in the admitted absence of any *Miranda* warnings."

The Ohio Supreme Court, however, relied on the distinction drawn in *Schmerber v. California*, 384 U.S. 757, between "communications" or "testimony" and "that compulsion which makes a suspect or accused the source of 'real or physical evidence'" and applied to handwriting exemplars in *Gilbert v. California*, 388 U.S. 263.

The Ohio Court concluded, therefore, that a handwriting exemplar, used solely for identification purposes, is a mere identifying physical characteristic, and as such

is outside the scope of the Fifth Amendment privilege against self-incrimination—even if the words written are identical to the words contained in a writing directly linked to the crime. Further, there is no requirement that *Miranda* warnings be given prior to the giving of such a handwriting exemplar.

In overturning the Fourth Amendment basis for reversal—that the exemplar should have been suppressed as "tainted fruit" under the exclusionary doctrine of *Wong Sun v. United States*, 371 U.S. 471,—the Ohio Supreme Court upheld the trial court's determination that no arrest, either lawful or unlawful, was made at the time the juvenile was questioned in his own home. The opinion also notes that the testimony of the juvenile himself was that he gave the handwriting exemplar freely and voluntarily.

In the circumstances of this case, the refusal to suppress the handwriting exemplar does not provide any basis for Fourth Amendment or Fifth Amendment review by the Court.

3. Petitioner's third premise is concerned with the application of an Ohio Statute, Section 2151.352, Ohio Revised Code, granting to the parents of a juvenile the right to be present at any hearing and with a claimed abuse of discretion by the trial court when he ruled that the parents as prospective witnesses in juvenile court were subject to the order granting a separation of witnesses.

The Ohio Supreme Court has stated that the purpose of this statute is to insure to the juvenile his right to counsel and/or his right to have his parents present at any hearing. In this opinion of the Court, such a provision is not intended to and does not take away from a trial court its basic right to order a separation of *witnesses* until such time as such witnesses have testified. During

such time the exclusion is not of parents, as such, but instead is the exclusion of witnesses.

The Ohio Supreme Court held further: "Moreover, during such time as the parents were so excluded, the juvenile was fully and adequately represented by two attorneys. Under these circumstances, no possible prejudice to the juvenile could result from such exclusion."

No infringement upon any constitutional right of the juvenile entitling him to review by this Court is presented by these circumstances.

Under the heading "Second Premise" petitioner argues that the trial court prejudged the case and to support this premise petitioner quotes the last sentence from the juvenile judge's finding of delinquency as follows (p. 16):

> "I think we would be doing James a gross disservice if, from the evidence here, for some reason other than the truth of the whole situation, I would have to make a finding that he didn't do this because I know that he knows he did it with the exception of the Velotta."

Under "Fourth Premise" petition reverts to the same subject and there claims that the court implied that "despite the fact that the evidence indicated otherwise, the court would have been doing James a gross disservice to have followed the evidence." That is precisely the opposite of what the court was saying.

In *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647, specific mention is made of concerns which might create the likelihood of prejudgment by the juvenile judge. The Court dismisses them as ignoring "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates."

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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